No. 92-938 (6)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MAURICE RIVERS AND ROBERT C. DAVISON,
Petitioners,

v.

ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Should § 101 of the Civil Rights Act of 1991, enacted during the pendency of this case, apply to plaintiffs' claims under 42 U.S.C. § 1981 when those claims are tried on remand?

PARTIES TO THE PROCEEDING

The Petitioners, plaintiffs in this action, are Maurice Rivers and Robert C. Davison, black former employees of the defendant. The Respondent is defendant Roadway Express, Inc., a national trucking company which operated a garage in Toledo, Ohio where Rivers and Davison worked.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 973 F.2d 490 (6th Cir. 1992), and is set out at 1a-16a of the Appendix to the Petition for Certiorari.[1] The order of the Court of Appeals denying respondent's petition for rehearing and for rehearing *en banc* is unreported and is set

[1] Citations to the Appendix to the Petition for Certiorari are in the form "P.A. __."

out at P.A. 17a-18a. The opinion of the United States District Court for the Northern District of Ohio, Western Division, is unreported, and is set out at P.A. 19a-24a.

JURISDICTION

The decision of the Sixth Circuit was entered on August 24, 1992. Respondent's timely petition for rehearing *en banc* was denied on October 13, 1992. The Court granted the petition for *certiorari* on February 22, 1993. On March 23, 1993, the Clerk granted an extension of time within which to file this Brief up to and including April 30, 1993. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. § 1981, as amended by § 101 of the Civil Rights Act of 1991, 105 STAT. 1071, P.L. 102-166, codified at 42 U.S.C. § 1981(b), and Title VII, 42 U.S.C. §§ 2000e-et seq. Prior to the 1991 Act, § 1981 provided as follows:

> All persons within the jurisdiction of the United States shall have the same right to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other.

Section 101 of the Civil Rights Act of 1991 amends § 1981 as follows:

SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended —

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end the following new subsections:

> "(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> "(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

This case also involves provisions of the Civil Rights Act of 1991 relating to the Act's application to pending claims, including sections 109(c), 402(a) and 402(b), which provide in pertinent part:

SEC. 109. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

* * *

(c) APPLICATION OF AMENDMENTS.—The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

SEC. 402. EFFECTIVE DATE.

(a) IN GENERAL.—Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

(b) CERTAIN DISPARATE IMPACT CASES.—Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

Title VII provisions prohibiting discriminatory discharge and retaliation provide in pertinent part:

SEC. 2000e-2. UNLAWFUL EMPLOYMENT PRACTICES

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

SEC. 2000e-3. OTHER UNLAWFUL EMPLOYMENT PRACTICES

(a) DISCRIMINATION FOR MAKING CHARGES, TESTIFYING, ASSISTING, OR PARTICIPATING IN ENFORCEMENT PROCEEDINGS. It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this title or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing about this title.

STATEMENT OF THE CASE

Petitioners Maurice Rivers and Robert C. Davison seek reversal of the decision of the United States Court of Appeals for the Sixth Circuit not to apply § 101 of the Civil Rights Act of 1991 to their claims of race discrimination in employment against their former employer, Roadway Express, Inc. ("Roadway" or "the Company").

1. Statement of Facts

The allegations and the facts of record in support of plaintiffs' contentions are as follows: Maurice Rivers and Robert Davison, who are both experienced black garage mechanics, worked successfully for Roadway from 1972 and 1973, respectively, until they were discharged in 1986. They were two of only four black employees working in Roadway's Toledo garage in 1986. On August 22, 1986, Roadway

managers told Rivers and Davison to attend disciplinary hearings on their accumulated work records. J.A. 17a;[2] Guy depo. 8/12/87, at 151.[3] For racially discriminatory reasons, the managers did not give Rivers and Davison the contractually required prior written notice routinely provided to white employees. Davison depo. 7/20/87, at 187-88; Rivers depo. 7/14/87, at 297-299; Guy depo. 8/12/87, at 148-151. Both plaintiffs refused to attend the hearings because of the inadequate notice. Both were suspended in their absence. They filed successful grievances complaining of the preemptory, racially discriminatory disciplinary proceedings. J.A. 17a; Rivers depo. 7/14/87, at 321-22; McCord depo. 9/3/87, at 285-86, 293. As soon as plaintiffs prevailed on their grievances, however, Roadway again convened disciplinary hearings, again without the requisite notice, and discharged the petitioners on September 26, 1986 after they refused to attend. J.A. 16a; McCord depo. 9/3/87, at 286; Rivers depo. 7/14/87 at 327; Guy depo. 8/12/87 at 168-69. P.A. 2a-3a. The discharges were retaliatory and racially discriminatory. *Id.* *See generally* P.A. 2a-3a.[4]

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[2] Citations to the Joint Appendix are referred to in the form "J.A. __."

[3] Citations in this form refer to depositions in the record below.

[4] The district court severed the claims of Rivers and Davison from those of their original co-plaintiff, James T. Harvis, Jr., on the ground that the claims were based on different factual circumstances and a joint trial could be prejudicial. Harvis' trial was conducted first, from May 30, 1989 through June 13, 1989, J.A. 8a-9a, with the Rivers and Davison jury trial scheduled to proceed starting on September 12, 1989. J.A. 8a. This Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), on June 15, 1989, immediately following Harvis' trial, and Rivers' and Davison's jury trial never took place.

2. Proceedings Below

Rivers and Davison sued under 42 U.S.C. §§ 1981, 2000e et seq., and demanded a jury.[5] J.A. 3a. The district court dismissed their § 1981 discriminatory and retaliatory discharge claims prior to trial based on this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). P.A. 1a-16a. *Patterson* construed the right to "make and enforce contracts" as not protecting workers from post-hiring race discrimination unless the discrimination was related to the making of a new contract (as in certain instances of promotion discrimination), 491 U.S. at 177, 185-86, or unless it affected the enforcement of contract rights (as in discrimination relating to a grievance or complaint of a breach of contract), *id.* at 177-78. After the court dismissed the § 1981 claims, it conducted a bench trial on the Title VII claims and found in favor of defendant Roadway. J.A. 11a-12a.

Rivers and Davison filed a timely appeal. J.A. 13a. While the appeal was pending, Congress enacted the Civil Rights Act of 1991, which among other things, overturned *Patterson*. Pub. L. No. 102-166, 105 Stat. 1071 (1991). The Court of Appeals for the Sixth Circuit granted the parties leave to file supplemental briefs addressing the applicability of the 1991 Act.

In an opinion dated August 24, 1992, the Court of Appeals reversed. P.A. 1a-18a. The court held that the district court erred in dismissing the § 1981 retaliation claims because *Patterson* permitted claims of discrimination in

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[5] Plaintiffs also asserted claims against Roadway under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), and a hybrid § 301/duty of fair representation claim against the Union, Local Union 20, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. These claims are not at issue here, and the union is not a party in this Court.

enforcement of contracts, and Rivers' and Davison's "ability to enforce claimed contract rights was impaired because of their race." P.A. 8a. The Sixth Circuit thus remanded the case for a jury trial under § 1981 on the claims of discrimination in contract enforcement and directed redetermination by the district court of the racial discharge claims under Title VII if necessary in light of the jury's verdict, as required by *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990). P.A. 9a-10a.

The Court of Appeals held, however, that when the case is tried to a jury for the first time on remand, the unamended version of § 1981 as construed by *Patterson* should apply, rather than the current version as amended by § 101 of the Civil Rights Act of 1991. P.A. 11a-14a. The Court thus applied *Patterson* retroactively even after it had been legislatively rejected. It held — nine months after Congress enacted the Civil Rights Act of 1991 repudiating *Patterson* and directing that the statute "take effect upon enactment" — that the 1991 Act did not apply to plaintiffs' pending § 1981 claims.[6] Section 101 of the Act defines § 1981's reference to the equal right to "make and enforce contracts" to include an equal right to "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." *Patterson*, in contrast, limited § 1981 to discrimination in either the contract-formation stage, or in efforts to enforce contract rights, which lower courts have construed not to cover most discrimination on the job or in firing. *See, e.g., Hull v. Cuyahoga Valley Bd. of Educ.*, 926 F.2d 505 (6th Cir.) *cert. denied*, 111 S.Ct. 2917 (1991).

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[6] Judge Siler concurred in the decision not to apply the amended version of § 1981, but dissented from the holding that *Patterson* does not bar the claims. P.A. at 14a-16a.

Under the remand order, only the claims of retaliatory discharge specifically linked to plaintiffs' efforts to enforce their contractual rights will be tried to the jury under instructions conforming to *Patterson*. The claims of discriminatory discharge and retaliation not linked to contract enforcement — e.g., not involving impairment of a right to grieve contract violations — will then be decided by the judge in light of the jury's verdict. If plaintiffs prevail on the claims governed by *Patterson*, they will be entitled under the Sixth Circuit's decision to a Title VII judgment and to backpay on all claims, but may seek damages only on the claim of discrimination in contract enforcement. Thus, the practical effects of not applying § 101 in this case are that a judge, not a jury, would determine plaintiffs' claims of race-based discharge, and even if the jury finds discrimination on the contract enforcement claim, no damages beyond backpay would be available on the racial discharge claim.

SUMMARY OF ARGUMENT

Section 101 of the Civil Rights Act amends 42 U.S.C. § 1981 to ensure that the § 1981 right to "make and enforce" contracts free from racial discrimination includes the right to "performance, modification, and termination of contracts" without regard to race, and the equal enjoyment of "all benefits, privileges, terms and conditions of the contractual relationship." The question here is whether § 101 applies to plaintiffs' pending employment discrimination claims against their former employer, Roadway Express, Inc., when those claims proceed to trial. For two independent reasons, § 101 does apply.

First, the plain language and structure of the Civil Rights Act of 1991 mandate that the Act be applied to this case. The Act directs that it "shall take effect upon enactment." It was enacted on November 21, 1991, and is thus applicable to cases pending as of that date. Two exemptions from the general rule of immediate effectiveness

expressly preclude the Act's application to certain pre-existing claims. The language of these exemptions and the fact that they were carved out of the general rule make clear that Congress intended the Act to apply to pre-existing claims which were *not* explicitly exempted.

Second, even if the Act's plain meaning did not require that it apply here, § 101 is presumed to apply to a pending case such as this one. The unanimous Court in *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974), held that new statutory provisions presumptively apply to pending cases unless the statute directs otherwise, or the application would create a "manifest injustice." The analysis under *Bradley* must focus on the particular provision sought to be applied, i.e. § 101 here, and not on the statute as a whole. There is nothing in the text or history of the Act that would overcome the *Bradley* presumption with respect to § 101.

Application of § 101 here also does not impose any "manifest injustice" under *Bradley*, and failure to apply it would be unfair to Rivers and Davison. Section 1981 as amended is a key component of federal protection against race discrimination in employment, and its prompt enforcement not only is in the national interest, but is necessary to ensure Petitioners a full remedy. Moreover, Roadway has no matured or vested rights that are implicated by application of § 101; the law's application here would merely afford plaintiffs additional remedies and procedures for violations already covered by Title VII. No new and unanticipated substantive obligations would be imposed on Roadway as a result of applying § 101. When Petitioners were fired, retaliatory and race-based discharge were both against federal law: Title VII has consistently prohibited such conduct, and because Roadway fired Rivers and Davison prior to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), § 1981 was also then assumed to prohibit it. Section 101 is thus merely restorative of the law as the

parties knew it when the conduct challenged in this case took place.

The *Bradley* presumption is consistent with the decisional law that preceded and followed *Bradley*. The characteristics of § 101 which make its application fair under *Bradley* also make it typical of the kinds of statutes that traditionally were applied to pending cases long before *Bradley*. Section 101 as applied here is remedial and procedural. It is also restorative. New laws that are remedial, procedural, or restorative are properly applied to pending claims. In contrast, statutes that disturb vested rights or that render conduct illegal after it has occurred, routinely have not been applied to pending cases, and such statutes are similarly inapplicable under *Bradley*'s manifest injustice exception.

This Court's cases since *Bradley* carry forward these same basic principles. For example, the Court in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), refused to apply a post-hoc change in rates for medical services already performed. *Bowen* thus involves the type of new law which, under *Bradley*, is not presumed to apply because it would impair vested rights and thereby amount to a manifest injustice. *Bowen*'s statement that "[r]etroactivity is not favored in the law" is best understood to use the word "retroactivity" as a term of art, referring precisely to those applications of new laws that would impermissibly disturb vested rights or change substantive legal rules. Thus, *Bradley* establishes a presumption that new laws apply in the absence of manifest injustice, and *Bowen* announces a presumption against application of laws when such application would be "retroactive," *i.e.* when it would cause the very injustice that the *Bradley* standard is designed to avoid. These principles require that § 101 be applied to the pending case.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE CIVIL RIGHTS ACT OF 1991 REQUIRES ITS APPLICATION TO THE PENDING CASE

Based on the language of the 1991 Civil Rights Act, the Court should apply § 101 of the statute here. As this Court recently held, "[t]he starting point for interpretation of a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980)). Thus, "where the Congressional intent is clear, it governs." *Id.* The language of the Civil Rights Act of 1991 expresses Congress' clear intent that the Act apply to pending cases. *Estate of Reynolds v. Martin*, 985 F.2d 470 (9th Cir. 1993).

Three provisions of the Civil Rights Act of 1991 expressly address the applicability of the Act to pending cases. Section 402 contains two of those provisions — the general rule requiring immediate application of the 1991 Act (in subsection 402(a)) and one exception to that rule (in subsection 402(b)):

> SECTION 402. EFFECTIVE DATE.
>
> (a) In General. — Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.
>
> (b) Certain Disparate Impact Cases. — Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.[7]

Additionally, § 109 states, in relevant part:

> SECTION 109. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.[8]
>
> * * *
>
> (c) Application of Amendments. — The amendments made by this section shall not apply with respect to conduct occurring before the date of enactment of this Act.

These provisions, viewed in light of accepted principles of statutory construction, require that the Act be applied to pending claims not specifically excepted. These are the only provisions in the entire Act regarding when it applies, and not one word suggests that the Act was not intended as a general matter to apply to pending cases.

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[7] Section 402(b), excepting "certain disparate impact cases" from the Act, is a special provision proposed by Alaska Senator Murkowski, who selected the filing and decision dates referred to in order to ensure that the provision excepts only *Wards Cove Packing Company v. Atonio*, 490 U.S. 642 (1989). Section 402(b) relieves Ward's Cove Packing Company from the obligation to defend itself under the 1991 Act's standards.

[8] Section 109 extends the protections of the Civil Rights Act of 1964, as amended, to United States citizens working overseas for American companies, and thus overrules *EEOC v. Arabian American Oil Co. & Aramco Serv. Co.*, 499 U.S. ___, 111 S. Ct. 1227 (1991).

Even standing alone, § 402(a) makes clear that § 101 applies to petitioners' § 1981 claims. Section 402(a) states the general rule for application of the 1991 Act. It explicitly provides that the Act must "take effect upon enactment." The changes in the law must be construed as effective and binding upon the enactment date, November 21, 1991, which was well before the Court of Appeals issued its August 24, 1992 remand order. Section 1981 as amended by § 101 — rather than the pre-Act version of § 1981 as construed in *Patterson* — must apply in all proceedings in this case after November 21, 1991. The consequence of applying § 101 would be that all of plaintiffs' race discrimination claims, whether they involve retaliation for contract enforcement or not, would on remand be tried to the jury, and damages would be available if plaintiffs prevail. The Sixth Circuit, however, erroneously decided that only the contract-enforcement claims should go to the jury and provide a basis for an award of damages, and that even if the jury finds that the Company was racially motivated, the racial discharge claims should be redetermined by the judge. That decision contradicts the 1991 Act's express terms requiring courts to give the statute effect as of its enactment date, November 21, 1991.

The language of the 1991 Act is clear notwithstanding that it does not utilize words such as "prospective" or "retrospective." Indeed, in order to be clear with respect to its applicability or non-applicability to pending claims, a statute need not refer to pending or pre-existing claims specifically, either by way of inclusion or exclusion. In *Kaiser Aluminum Corp. v. Bonjorno*, 494 U.S. 827, for example, the statute did not state in so many words that it was inapplicable to pending claims. The Court, however, drew inferences from the language and structure of the law and held based on those inferences that the "most logical reading of the statute" on its face was that it did not apply

to pending claims. *See also Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) (holding that "the words of the statute must be read in their context and with a view to their place in the overall statutory scheme"). The inferences to be drawn from the plain language and structure of the 1991 Act are far more straightforward than those this Court made in *Bonjorno* in reaching the conclusion that the statute in that case was clear on its face.[9]

The "most logical reading" of the 1991 Act requires application of § 101 to Rivers' and Davison's § 1981 claims, because where Congress intended the Act *not* to apply to pending claims, it said so. Sections 402(b) and 109(c) are the only two exceptions to § 402(a)'s general mandate that the 1991 Act "take effect upon enactment." Section 402(b) forbids immediate application of the Act to a particular pending case, and § 109(c) forbids application of the Act to pre-existing claims regarding discrimination overseas. The presence of those two exceptions compels the conclusion that § 101, which is not subject to any such exception, must be applied to pending cases such as this one.

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[9] The statute at issue in *Bonjorno* nowhere referred to pending claims, and did not state that it was prospective only. Rather, the Court concluded that the statute plainly did not apply to the pending claims in *Bonjorno* because it referred to calculation of interest "from the date of the entry of the judgment....," 494 U.S. at 838, and because it referred to "*the* rate" and "*a* rate" of interest, *id.* (emphasis in opinion). The Court viewed these terms as meaning that a single rate should be applied, and that it should be the rate that was in effect on the date of entry of the judgment, so that the post-judgment Act could not apply. *Id.* at 839-40. Thus, although the dividing point between cases with pre-Act judgments and cases with post-Act judgments was not specified by the legislation, the Court said that it was clear because that was "the most logical reading of the statute." *Id.* at 838.

That § 402(a) establishes a rule of application *different* from §§ 109(c) and 402(b) is emphasized by the particular terms Congress used. Section 402(a) controls "*except* as otherwise *specifically* provided." (Emphasis added). This language makes plain that the only other specific provisions regarding applicability of the Act — §§ 109(c) and 402(b) — are *exceptions* to the general rule stated in § 402(a). Similarly, § 402(b) controls "*notwithstanding any other provision* of the Act." The only "other provision" even potentially relating to the applicability of the Act in the circumstances described in § 402(b) is the general rule in § 402(a). If § 402(a) already excluded all pre-existing claims, both § 402(b) and § 109(c) would be unnecessary surplusage.

The conclusion that § 402(a) contemplates application of the Act to pre-existing claims not exempted by §§ 109(c) and 402(b) is dictated by two well established canons of construction. First,

> [w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Russello v. United States, 464 U.S. 16, 23 (1983) (*quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982); *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980). The Court this Term unanimously applied this rule in *Leatherman v. Tarrant County*, 61 U.S.L.W. 4205, 4207 (March 3, 1993), to hold that no heightened standard of particularity applies to the pleading of § 1983 claims. Federal Rule of Civil Procedure 9(b) requires special particularity in pleading certain actions, but does not include § 1983 claims among them, so the Court held that § 1983 claims are not subject to the requirement of special

particularity. The Court in *Leatherman* applied the venerable rule "expressio unius est exclusio alterius," *id.*, or, as Black's Law Dictionary translates, "the expression of one thing is the exclusion of another." The fact that the 1991 Act exempts from § 109, and from that section alone, "conduct occurring before the date of enactment," can only be read as a decision *not* to place any such limitations on the other provisions of the Act. Similarly, the decision specially to exempt the *Wards Cove* case from the Act's provisions implies that the Act does not exempt other pending litigation, such as this case.

A second canon of statutory construction supporting application of § 101 in this case is the rule against construing any statutory provision as redundant. As this Court held in *United States v. Menasche*, 348 U.S. 528 (1955), "[t]he cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section...." *Id.* at 538-39 (internal quotations marks and citations omitted). This rule was reaffirmed last Term in *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1015 (1992), in which the Court held that "a statute must, if possible, be construed in such a fashion that every word has some operative effect."[10] If § 402(a) were construed to bar application of the Act to conduct occurring before the date of enactment, § 109(c)'s directive that § 109 "shall not apply

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[10] *See, Kungys v. United States*, 485 U.S. 759, 778 (19) (holding that "no provision [of a statute] should be construed to be entirely redundant"); *Mackey v. Lanier Collections Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) (stating that "we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law"); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (holding that reading a statute to render a section "redundant or largely superfluous" violates "the elementary cannon of construction that a statute should be interpreted so as not to render one part inoperative").

with respect to conduct occurring before the date of enactment" would be a mere reiteration of a rule already laid down generally by § 402(a). Similarly, if § 402(a) barred application of the Act to *all* pending cases, there would be no need to enact 402(b), barring its application to one specific pending case. *See Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1960) ("If there is a big hole in the fence for the big cat, need there be a small hole for the small one?") (*quoting Polaroid Corp. v. Commissioner of Internal Revenue*, 278 F.2d 148, 153 (1st Cir. 1960).[11]

The Court of Appeals in this case misapplied the rules of statutory construction by relying on extraneous statements to reject the statute's plain meaning. Although the court acknowledged plaintiffs' contention that "retroactivity is implied because two sections are expressly made prospective," it dismissed that plain language implication by drawing on a passing reference in a statement accompanying the President's veto of the Civil Rights Act of 1990, which contained a completely different effective date provision, and on Congress' failure in 1990 to override that veto. P.A. 12a.[12] The court below adopted this analysis

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[11] To read §§ 109 and 402(b) as mere "insurance policies" adopted to make doubly clear in certain instances that the Act shall not apply is to ignore this basic rule against construing statutes to render provisions redundant. *E.g., Butts v. City of New York Dep't of Hous. Preservation and Dev.*, No. 92-7850, 1993 WL 85026, at *11 (2d Cir., Mar. 24, 1993) (citing cases). If every redundancy could be called an insurance policy, this rule would be turned on its head. The very notion of a provision being an "insurance policy," or reiteration of another provision, contravenes the well established rule that each statutory provision must be read to have independent meaning.

[12] Section 15 of the 1990 Act, passed by the House and Senate in October 1990, made the *Patterson* provision applicable to "all (continued...)

from *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1377 (8th Cir. 1992), in which the court inferred from the Senate's failure by a single vote to override the 1990 veto that Congress "knew from their 1990 experience that, because of the President's veto power, *they could not enact a law [in 1991] that purported to legislate retroactively*." *Id.* (Emphasis in original). The bill President Bush signed in 1991, however, contained numerous provisions that he deemed unacceptable in his 1990 veto message, including the right to a jury trial, the availability of punitive damages, and compensatory damage awards up to $300,000.[13] In addition, both *Fray* and the court in this case ignored the fact that in 1991, attempts to *preclude* application of the act to conduct occurring before its effective date were also repeatedly defeated.[14] While the lower court in this case correctly concluded that the legislative history on the applicability of § 101 to pending claims reflects "conflicting views," P.A. 12a, a few sentences later it erroneously relied

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[12](...continued)
proceedings pending on or commenced after June 15, 1989" and allowed courts under certain circumstances to vacate completely final judgments "as to which the rights of any of the parties thereto have become fixed and vested." H.R. Conf. Rep. No. 856, 101st Cong., 2d Sess. 10 (1990).

President Bush's October 22, 1990 veto message included a passing reference to the bill's "unfair retroactivity rules" — a reference not to the application of the Act to pending cases but rather to the authorized reopening of closed and dismissed cases as to which all appeals had been exhausted. *See* 136 Cong. Rec. S16562 (daily ed. October 24, 1990).

[13] *Compare* 42 U.S.C. § 1977A(b) and (c) *with* 137 Cong. Rec. S16562 (daily ed. Oct. 24, 1990).

[14] *See* 136 Cong. Rec. H6747 (daily ed. Aug. 3, 1990), *rejected at id.* 6768; 137 Cong. Rec. H3998 (daily ed. June 4, 1991), *rejected at id.* 3908.

on legislative history as if it were unambiguous and thereby undermined the clear message of the statute's language.[15]

II. THE RELEVANT LEGAL PRESUMPTION REQUIRES APPLICATION OF § 101 OF THE CIVIL RIGHTS ACT OF 1991

A. SECTION 101 PRESUMPTIVELY APPLIES UNDER *BRADLEY V. RICHMOND SCHOOL BOARD*

Because the language of the Act is clear, the statute's plain meaning is a sufficient ground standing alone to require reversal of the decision of the Sixth Circuit. If, however, the Court disagrees that the statute's text in itself requires application of § 101 to future proceedings in this case, the presumption in favor of retroactivity independently requires that result.

In *Bradley v. Richmond School Board*, this Court unanimously held that

> a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

416 U.S. 696, 711 (1974), *citing United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed 49 (1801). *See Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268 (1969). *Bradley* applied § 718 of the 1972 Emergency School Aid Act, which provided for

[15] Unless legislative history is unequivocal in opposition to application of new legislation to pending cases, it cannot be read to alter the textual message of the statute. *Regan v. Wald*, 468 U.S. 222, 237 (1984); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982); *see Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in part and concurring in the judgment).

attorney's fees for school desegregation litigation for time spent on the case prior to the law's effective date. The Court of Appeals denied a fee award, asserting that statutes should not be applied to conduct occurring before their effective date unless Congress clearly mandated such application. *See* 416 U.S. at 715 n. 20. This Court reversed, holding that "we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." *Id.* at 715. Rather, the correct presumption is precisely the opposite: a law is presumed to apply unless it directs otherwise or its application would be unjust. *Id.* at 711.

This Court has repeatedly reaffirmed *Bradley*. In *Hutto v. Finney*, 437 U.S. 678, *reh'g denied*, 439 U.S. 1122 (1979), the Court applied the Civil Rights Attorney's Fees Awards Act of 1976 to a case that was pending when the Act was passed, based in part on "this Court's general practice" of applying to pending cases statutes that are silent as to their applicability. *Id.* at 694 n. 23.[16] In *Cort v. Ash*, 422 U.S. 66 (1975), the Court followed *Bradley* to apply a new law giving the Federal Elections Commission jurisdiction over a pending challenge to misuse of corporate funds: "[T]he Amendments constitute an intervening law that relegates to the Commission's cognizance respondent's complaint.... [O]ur duty is to decide this case according to the law existing at the time of our decision." *Id.* at 76-77 (citing *Bradley*). *See Bennett v. New Jersey*, 470 U.S. 632, 639 (1985) (reaffirming *Bradley* and declining under the "manifest injustice" exception to apply a 1978 amendment establishing new substantive standards for Title I expenditures to funds already spent under earlier grants); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n. 16

[16] *Hutto* also illustrates that Congress legislates in reliance on *Bradley*. *See id.* at 694 n. 23 (*quoting* House Report which acknowledges *Bradley* standard).

(1981) (following *Bradley* to hold that an appellate court must apply the law in effect at the time it renders its decision); *see also, Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987) (relying on *Thorpe* and *Schooner Peggy*).[17]

Bradley mandates application of the Civil Rights Act of 1991 to this case unless there is "statutory direction or legislative history to the contrary," or unless application of the Act would result in "manifest injustice" to the defendant. None of these conditions obtains here.

1. No Statutory Direction or Legislative History Contravenes Application of § 101

First, there is no language in the Civil Rights Act of 1991 that forbids its application to pending cases. Even if the Court disagrees with Point I, supra, and holds that the text is unclear as to whether the statute applies to pending cases, Point I certainly demonstrates that the statutory text cannot be read as clearly *precluding* its application to *all* pending claims.

Second, the legislative history of the Act does not preclude its application to pending cases. The context, purpose and history of the statute are consistent with application of § 101 here. The original, bipartisan sponsors and leading proponents were Senator Kennedy in the Senate and Representatives Edwards and Fish in the House. Each of them insisted that the Act applied to pending cases, unless in a particular case that application would be

[17] Decisions upon which Roadway relied below to urge that *Bradley* was an aberration which should not be followed are actually consistent with *Bradley* and support application of § 101 here. *See infra*, Point II.C.

manifestly unjust.[18] The views of these sponsors were the same as those reflected in the analysis agreed upon in the 1990 committee reports, which recognized that the rule in *Bradley* controlled and generally favored application to pending cases.[19]

Senator Danforth disagreed with Senator Kennedy about which legal presumption, if any, was likely to govern application of the Act to pending cases. 137 Cong. Rec. S15483-85 (daily ed. Oct. 30, 1991) (interpretative memorandum introduced by Sen. Danforth). Senator Danforth believed that applicability under the Act should be decided not under *Bradley*, but under *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988), and the opinion of Justice Scalia in *Kaiser Aluminum v. Bonjorno*, 494 U.S. at 840. 137 Cong. Rec. S15483 (daily ed. Oct. 30, 1991). Senator Danforth explicitly acknowledged, however, that the views he expressed "may not be the interpretation of Senator Hatch or Senator Kennedy or anyone else." 137 Cong. Rec. S15325 (daily ed. Oct. 29, 1991). These views do not amount to a congressional mandate overriding the *Bradley* presumption.

[18] 137 Cong. Rec. S15485 (daily ed. Oct. 30, 1991), *id*. S15936 (daily ed. Nov. 5 1991) (remarks of Senator Kennedy approving of the general rule that new legislation is applied to pending cases); 137 Cong. Rec. H9530-31 (daily ed. Nov. 7, 1991) (remarks of Representative Edwards underscoring importance of application of Act to pending cases to avert many years of future enforcement of repudiated law, and to avoid conferring an undeserved windfall on defendants); *id*. at H9549 (remarks of Representative Fish, concurring with Rep. Edwards and stating "I think it should be clear that the bill applies to pending cases").

[19] H.R. Rep. 101-644, pt. 2, at 45 (101st Cong., 2d Sess. 1990); S. Rep. 101-315, at 59 (101st Cong. 2d Sess. 1990).

The extraordinary lengths to which Congress went to add the § 402(b) exception to a version of the Act which already contained § 402(a) also forecloses the possibility that, under § 402(a), the Act applies only prospectively. Alaska Senator Murkowski sought the § 402(b) exception for Ward's Cove Packing Company alone, and he explicitly said so in seeking support for it. Murkowski assured his colleagues that the *Wards Cove Packing Co. v. Atonio* case is the only case that fits the general-sounding description in 402(b). 137 Cong. Rec. S15954 (daily ed. Nov. 5, 1991). The inclusion of this section was necessary only because without it, Congress understood that the Act *would* have applied to the Ward's Cove Packing Company pursuant to § 402(a). When the 1991 Act passed the Senate on October 30, 1991, however, § 402(b) was inadvertently omitted. Senator Dole then took the extraordinary step of insisting that the bill be returned to the Senate floor for further debate and a separate vote to add this provision.[20] When the bill was presented for a second vote, both supporters and opponents of the § 402(b) exemption in the House and Senate concurred that its effect was to exempt the Wards Cove Company from the 1991 Act standards in the litigation still pending against it (a result that the supporters lauded and the opponents decried). This controversy would have

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[20] *See generally* 137 Cong. Rec. S15950-68 (daily ed. Nov. 5, 1991).

According to members of Congress, President Bush, too, insisted on a separate vote on § 402(b). *See* 137 Cong. Rec. H9506 (daily ed. Nov. 7, 1991) (Rep. McDermott) ("[T]he Rules Committee was forced to adopt a closed rule, because the White House said the bill will be vetoed if this *Wards Cove* exemption is removed."); H9511 (daily ed. Nov. 7, 1991) (Rep. Walker) ("I have heard the President would veto this bill unless this exemption for *Wards Cove* is included.")

been unintelligible if § 402(a) already made the entire Act inapplicable to pre-existing claims.

The congressional intent behind § 101 in particular also belies any conclusion that Congress intended the Act to apply only to post-Act cases. There was complete unanimity from the outset of the legislative process in 1989 that the *Patterson* decision improperly narrowed the law and should be repudiated.[21] An important part of Congress' motivation from the outset of the entire legislative process was to stop dismissals of § 1981 claims under *Patterson*.[22] Even the Bush Administration, whose legislative proposal also rejected *Patterson*, expressed dissatisfaction with "the cases applying *Patterson* over the past eight months."[23] Many of the dismissals which Congress and the President cited as improper were in cases in which Title VII claims were also pending — as they are in this case — but afforded no jury right and lesser remedies.[24] Application of § 101 to

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[21] *See infra* note 36.

[22] *See* S. Rep. No. 101-315, 101st Cong., 2d Sess., at 13 (1990) (referring to more than 200 race discrimination claims dismissed under *Patterson*).

Senator Hatch announced, after Brenda Patterson testified in Congress, that the bill "would *take care of* Brenda Patterson. We are prepared to do that right now. We are for overruling the Patterson versus McLean case." Cong. Rec. S 16465 (daily ed. Oct. 24, 1990) (emphasis added). If § 101 applied prospectively only, it could not "take care of" a plaintiff in a pending case, as Senator Hatch promised this legislation would.

[23] CIVIL RIGHTS ACT OF 1990: HEARINGS ON S 2104 BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES, 101st Cong., 1st Sess., at 111 (1990) (statement of Donald B. Ayer, Deputy Attorney General).

[24] *See* S. Rep. No. 101-315, 101st Cong., 2d Sess., at 13 (1990).

afford Rivers and Davison a jury trial and damages on each of their discrimination claims is consistent with the legislative purpose behind the enactment of that section.

2. No "Manifest Injustice" to Roadway Results from Applying § 101

There is no risk of "manifest injustice" from application of the Act to Rivers' and Davison's claims. Manifest injustice under *Bradley* is determined by "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717. No manifest injustice results from application of the 1991 Act here.

The central distinction made by the Court in *Bradley* regarding the "nature and identity of the parties" is between "mere private cases between individuals," in which application of a new law to pre-existing claims may be inappropriate, and litigation involving matters of "great national concern," where application of a new statute is presumed. 416 U.S. at 718-19.[25] Civil rights cases clearly fall within this latter category. The Reconstruction-era civil

[25] *Bradley* specifically identified school desegregation and Title II litigation as examples of matters of national concern. In Title II litigation, although the parties are not governmental actors, a private plaintiff functions as "a private attorney general, vindicating a policy that Congress considered of the highest priority." 416 U.S. at 719. The Court has repeatedly characterized eradication of employment discrimination as of similarly vital public importance. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court observed that there was "an equally strong public interest" in implementation of Title II and Title VII, *id.* at 415, and emphasized that enforcement of federal law against employment discrimination served the "[i]mportant national goals" of "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 417-21.

rights laws, including § 1981, were enacted to eliminate "the badges and the incidents of slavery,"[26] thereby addressing matters of as great a public concern as the United States courts have ever been called upon to adjudicate. The application of the Civil Rights Act of 1991 to these parties vindicates the important public purpose of preventing racial discrimination.

The second factor relevant to whether application of the statute would be unjust under *Bradley* is the nature of the rights at stake. This factor is primarily concerned with protecting accrued causes of action of *plaintiffs*:

> The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional.

Bradley, 416 U.S. at 720. *See Gulf Offshore Co.*, 453 U.S. at 486 n. 16 (holding that the "manifest injustice" exception does not apply where "the change does not extinguish a cause of action but merely requires a retrial").

No matured rights of Roadway are implicated by application here of § 101. At the time the alleged discrimination took place, discrimination in any aspect of employment was illegal under both Title VII and § 1981. Furthermore, as to § 1981, this was clearly Roadway's understanding.[27] The law in the Sixth Circuit was clear that

[26] *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 440 (1968).

[27] Prior to this Court's *Patterson* decision, the only legal basis upon which Roadway had contended that plaintiffs' § 1981 claims were not viable was its contention in the Supplement to Defendant Roadway Express Inc.'s Answer to Plaintiffs' First Amended

(continued...)

§ 1981 was available to remedy retaliatory and discriminatory discharge.[28] This Court had repeatedly assumed as much,[29] and the district court had sustained plaintiffs' § 1981 claims before this Court decided *Patterson*. J.A. 7a.

By having plaintiffs' § 1981 claims dismissed under *Patterson* in a case in which parallel Title VII claims were still pending, Roadway enjoyed a reprieve from facing a jury on plaintiffs' discrimination claims, and from the risk of having to pay damages beyond backpay. Given the pendency of the appeal, however, that reprieve cannot have generated any matured right that would be manifestly unjust to disturb. As this Court explained in *Freeborn v. Smith*, 69 U.S. 160 (1865):

> [I]t is hard to perceive what vested right the defendant in error had .... If either party could be said to have a vested right, it was

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[27](...continued)
Complaint that "section 1981 does not confer a private right of action for plaintiffs in this case." Indeed, Roadway conceded below, in characterizing the claims after *Patterson* as "*no longer* viable under § 1981," (emphasis added), that such claims previously were viable. Brief of Appellee, at 18.

[28] *See generally Cooper v. City of North Olmstead*, 795 F.2d 1265, 1270 (6th Cir. 1986) (holding that discriminatory discharge is actionable under § 1981, n.3); *Leonard v. City of Frankfort Elec. & Water Plant*, 752 F.2d 189, 195 (6th Cir. 1985) (same); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268 (6th Cir. 1977) (holding that retaliatory discharge is actionable under § 1981).

[29] Several Supreme Court cases assumed the viability of discharge and retaliation claims. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *St. Francis College v. Al Khazraji*, 481 U.S. 604 (1987); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 275 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975).

> [the] plaintiff ..., who had legally brought his case to this court for review, and whose remedy had been suspended by an accident or circumstance, over which he had no control. If the judgment below was erroneous, ... the defendant is only claiming a vested right in a wrong judgment. "The truth is ... there is no such thing as a vested right to do wrong ...."

69 U.S. at 175 (citation omitted). Because the district court erred in dismissing even the narrowed claims under *Patterson*, the § 1981 retaliation claim has been remanded for a jury trial independent of application of § 101. Under *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, moreover, if plaintiffs prove discrimination before the jury, the court will make new factual determinations and enter a new judgment on the Title VII claims consistent with the jury's findings.[30] To apply § 101 on remand to require that all of plaintiffs' discrimination claims be tried before the jury as opposed to the judge would therefore impair no matured rights. There is, of course, no matured right in a wrong judgment, such as the judgment of the district court in dismissing all § 1981 claims under an erroneous application of *Patterson*.

The third consideration relating to whether application of the Act would produce a "manifest injustice" is the impact of the change in the law. This factor concerns "the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." *Bradley*, 416 U.S. at 720. Because the cause of action under § 101 merely restores to plaintiffs their pre-*Patterson* § 1981 remedy for discrimination that has been

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[30] Roadway conceded below that, if the appeals court determined the § 1981 dismissal was in error, which it has since done, the Title VII judgment could not be left in place and estop the § 1981 litigation. Supplemental Brief of Appellee, at 48.

consistently illegal under Title VII, defendants cannot identify any "new and unanticipated obligations." Roadway was on notice when the challenged conduct occurred that discriminatory discharge of employees was illegal, and such conduct has consistently remained illegal at all relevant times.[31] This application of *Bradley* comports with the implication of *Bennett v. New Jersey*, 470 U.S. at 639-40, that *Bradley* does not require retrospective application of statutes that create new substantive liabilities. *See infra*, Point II.C., at 41-42. No new substantive liability is created by applying § 101 to allow a jury trial and damages on all claims on remand.

B. *Bradley's* Operation In This Case Is Consistent With Prior Law

For two centuries, application of new statutes to pre-existing claims has been a routine matter of statutory construction. Long before the decision in *Bradley*, this Court consistently recognized that, unless Congress expressly directed otherwise, statutes like § 101 presumptively applied to pre-existing claims. Two characteristics of § 101 make it presumptively applicable: (1) the changes it makes are remedial and procedural, and (2) it is restorative of the law as the parties and Congress previously interpreted it. Where a law enacts new remedies and procedures to enforce an existing right, the Court has long presumed that the new law applies to pre-existing claims. And where legislation restores a legal rule or standard that the parties knew governed their conduct when that conduct took place, such restorative legislation has also been presumed to apply to pre-existing claims. These two categories are consistent with the *Bradley* presumption and its manifest injustice exception; remedial

[31] Roadway itself asserted in the Court of Appeals that "there is no dispute that Appellants' claims, however characterized, were actionable under Title VII ...." Brief of Appellee, at 16.

and restorative laws are two common types of laws which, when applied to pending cases, do not create manifest injustice.

A new law which is *either* procedural *or* restorative presumptively applies in a pending case. Thus, even if the Court concluded that § 101 is not procedural and remedial, but substantive, the restorative nature of § 101 is an independent basis requiring its application here under this Court's settled law. And, similarly, even a non-restorative provision applies if the provision is merely procedural or remedial.

Other categories of new laws have for many years been presumed to be *in*applicable to pre-existing claims, and they coincide with the manifest injustice exception under *Bradley*: laws which revoke vested rights, and those which render illegal conduct that was legal when engaged in. This Court has consistently held that statutes which would vitiate a "vested right" or a matured cause of action if they were applied to pre-existing claims do not so apply.[32] The Court has also held that statutes altering established substantive rules of conduct on which parties had relied to their

[32] *E.g.*, *United States v. Heth*, 7 U.S. (3 Cranch) 399 (1806) (holding that vested right to compensation for past services at rate pertaining when services rendered cannot be disturbed by application of new statute lowering compensation rate); *id.* at 413 (Paterson, J.) (referring to presumption against construction that would "interfere with ... antecedent rights, services, and remuneration"); *id.* at 414 (Cushing, J.) (referring to presumption against construction that would "devest vested rights"), *id.* at 411 (Washington, J.) (referring to "expectation" of collectors); *Twenty Per Cent Cases*, 87 U.S. 179, 187-88 (1874) (holding, where raise in salary that was in effect when the work to be compensated was done was subsequently repealed, that the repeal would interfere with vested rights and should be construed so as not to apply).

detriment should not be applied to pre-existing claims.[33] The most common example of such reliance occurs where new legislation renders illegal conduct that was previously lawful. *See generally* Point II.C., *infra*.

1. Section 101 Applies Because it Affords Additional Remedies and Procedures

Because § 101 aids enforcement of anti-discrimination law by adding procedures and remedies, and does not substantively expand the types of race discrimination that federal law prohibits, this Court's cases during the last two centuries mandate that § 101 apply here. Section 101 would effect a remedial change here because it would enhance the available remedies for retaliation and for discriminatory discharge—conduct which has at all relevant times been illegal and subject to equitable relief under Title

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[33] *Lewellyn v. Frick*, 268 U.S. 238 (1925), referred to

> the general principle "that laws are not to be considered as applying to cases which arose before their passage" is preserved, *when* to disregard it would be to impose an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money in other ways.

268 U.S. at 252 (emphasis added). Similarly, in *Blodgett v. Holden*, 275 U.S. 142 (1927), the Court refused to apply a new tax to gifts given prior to its enactment, commenting:

> It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing.

275 U.S. at 147; see also *id*. at 149 (Holmes, J., concurring) (quoting *Lewellyn*).

VII. Section 101 merely provides an opportunity to recover damages for such conduct, and in this case an opportunity for a § 1981 jury trial on plaintiffs' discriminatory discharge claims. Thus, § 101 merely adds remedies and procedures for substantive wrongs already recognized.

Section 101 is therefore applicable under this Court's established law favoring application to pre-existing claims of new remedies to enforce established rights. Justice Holmes rightly observed that when Congress amends remedies, "it evinces a change of policy, and an opinion that the rights ... can be better preserved by "the [new remedial scheme.] The consideration applies with the same force to all cases...." *Howell v. Commons*, 239 U.S. 506, 508 (1916). Where Congress concludes that an existing remedial scheme is defective, and creates what it believes to be a fairer and more effective method of enforcement, that congressional judgment extends to all cases, whether they arose before or after the new law. Having made such a judgment, it would be surprising indeed if Congress chose to leave in effect for any category of cases the discarded remedial scheme which it had found inadequate.

The Court has consistently applied to pending cases statutes that alter the remedies available in civil litigation. In *Sampeyreac v. United States*, 32 U.S. 222 (1833), for example, the Court noted that

> Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed.... It therefore forms no objection to the [particular statute in question] that the cause of action existed antecedent to its passage, so

> far as it applies to the remedy, and does not affect the right.

32 U.S. at 239-240.[34]

The court below erroneously concluded that the 1991 Act makes a substantive — rather than remedial and procedural — change in the law in part because the court considered the 1991 Act as a whole, rather than examining the specific impact of applying § 101 in this case. P.A. 14a. But plaintiffs are not asking the Court to apply all of the 1991 Act's provisions here; they ask only that § 101 be applied. The Court in *Bradley* itself properly looked only at § 718 of the 1972 Emergency School Aid Act. 416 U.S. at 709. The 1991 Act in its entirety, like the 1972 Act at issue in *Bradley* and many other federal laws, is long and complex. The *Bradley* rule would be entirely unworkable if it required courts in each case to sift through dozens or perhaps hundreds of pages of statutory provisions to determine whether any of them are substantive before they can address the provision sought to be applied.

Under the Court of Appeals' analysis, this Court's doctrine on application of remedial and procedural changes would be all but abolished. The existence of any substantive provision in a statute would by definition bar application of other, wholly remedial or procedural provisions to pending cases. The proper application here of *Bradley*'s distinction between substantive and non-substantive changes in law

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[34] The Court has repeatedly applied to pending litigation new laws authorizing federal courts to hear claims the merits of which were actionable, in some other forum, prior to the new laws. *See e.g.*, *Andrus v. Charlestone Stone Prod. Co.*, 436 U.S. 604, 607-08 n. 6 (1978); *Watts, Watts & Co. v. Unione Austriaca*, 248 U.S. 9 (1918); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916); *Freeborn v. Smith*, 69 U.S. 160 (1865).

> requires examination of § 101 alone within the factual and procedural context of this case.

2. Section 101 Applies Because It Is Restorative

Section 101 should also be applied to pending cases because it repudiated what Congress viewed as this Court's too-restrictive interpretation of § 1981. The statute thereby returned the § 1981 standard to what the lower courts and the parties understood it to be when the conduct challenged in this case took place. When plaintiffs were fired in 1986, jury trials and damages were generally understood had been authorized under § 1981. Congress sought to restore what it and virtually all the lower courts thought had been the reach of § 1981 prior to *Patterson*.

The Supreme Court on a number of occasions has rejected arguments that vested rights are injured by legislation which was intended to restore formerly prevailing law or legal status. This principle was applied over a century before *Bradley* and *Bonjorno* in *Frisbie v. Whitney*, 76 U.S. 187 (1870). Frisbie, like many others similarly situated, had purchased and settled on land in an area of California "supposed by almost every one in that country to be private property." *Id.* at 188. A subsequent judicial decision, however, held that the land in question was actually the property of the United States, causing "a rush" of outsiders to file claims on the land under then-existing law authorizing homesteading on government land. Within a few months of the judicial decision, however, a "magnanimous" Congress adopted new legislation giving previous occupants such as Frisbie an opportunity to purchase at nominal cost the farms they had built and cultivated. The Supreme Court

unanimously rejected the claim of a subsequent homesteader that the new legislation violated his vested rights. *Id.* at 193-96.[35]

Because the parties in this case understood the governing law at the time of the underlying conduct to be the same in all respects — procedural, remedial and substantive — as the law which has been restored under § 101, no vested rights or expectations are at risk. *See supra* Point II. A.2. at 28-30. When the discrimination against Rivers and Davison took place, § 1981 was generally considered to apply to claims of discriminatory discharge. *See id.* Defendant Roadway never relied on the *Patterson* decision or any similar construction of § 1981 in personnel decisions with respect to Rivers and Davison, and the Company never asserted before *Patterson* that retaliation or discharge was not covered by § 1981. Section 101 should thus be applied here because it describes the law as the parties understood it when the challenged conduct occurred.

In determining whether a law is restorative, the Court also looks to the understanding of Congress regarding prior law. Laws enacted for the purpose of "correcting" judicial interpretations of statutes and restoring prior law should be applied to pending claims in order to give full effect to their restorative purpose. This result follows from the rule that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 380-81 and n.8 (1969). Thus, when Congress enacts legislation

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[35] *See also Cox v. Hart*, 260 U.S. 427 (1922) (holding vested rights not violated by statute restoring preference to claimant to public land who had settled there "when the law conferred a right to do so"); *Freeborn v. Smith*, 69 U.S. 160 (1865) (holding vested right not violated by new statute restoring an appeal right to an appellant whose appeal had been extinguished when Nevada changed from a territory to a state).

expressly designed to correct what it deems to have been an erroneous interpretation of statutory language, it would defeat the deference required by *Red Lion* to decline to apply the statute to pending cases in order to give effect to its restorative function.

If restorative legislation were applied only prospectively, for numerous litigants the law would not be "restored" at all. Where Congress considered the disapproved decision a mistaken departure from prior precedents, as it so clearly did with respect to *Patterson*, it may be presumed that Congress did not intend forever to disadvantage litigants who had the misfortune of having pending cases while the error was temporarily in effect. As the Ninth Circuit explained in *Estate of Reynolds v. Martin*, 985 F.2d at 475, "Congress' expressed desire to undo the effects of recent Supreme Court decisions, and to restore civil rights law to its previous state, reinforces our belief that Congress intended the courts to apply the Act to cases presently before them." A statute adopted for the express purpose of restoring prior law cannot plausibly be understood to codify for all pre-existing but unresolved claims the very decision which Congress disapproved.

The presumption in favor of application of restorative statutes does not depend on whether *Patterson* was actually wrongly decided. It does not matter whether the parties were "correct" in their pre-*Patterson* legal assumptions that § 1981 covered all forms of discharge and retaliation. Rather, the point is that those were their assumptions. The parties' understanding at the time is no less salient to the analysis here simply because the Court subsequently reached a different conclusion. If Roadway shared in the commonly held assumption, reasonable in view of case law at the time, that § 1981 prohibited race discrimination in all aspects of employment, it cannot now be heard to protest that application of § 101 produces unexpected and thus manifestly unjust effects.

It similarly does not matter whether Congress was actually "correct" in its view of the original version of § 1981. What matters is that Congress believed *Patterson* was a misinterpretation of the original statute, and that its purpose in enacting § 101 was to reiterate what it took to be the meaning and intent of the original statute. The issue is not what the original statute actually meant, but what Congress in 1991 thought (however mistakenly in the Court's view) the statute meant, and whether Congress thus believed the 1991 Act merely codified the intent of the earlier law. The legislative history on this precise point overwhelmingly supports the conclusion that Congress believed that *Patterson* was wrongly decided and therefore sought to restore § 1981 by legislatively overruling *Patterson*.[36] The structure of

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[36] Both in 1990 and in 1991, there was unanimity on this point, and even the strongest opponents of the overall legislation — in Congress and in the Bush Administration — agreed that *Patterson* created an unintended and unacceptable restriction of § 1981 rights. In an April 3, 1990 letter from Attorney General Thornburgh to Senator Kennedy, the Bush Administration vigorously opposed most of the 1990 bill Senator Kennedy and others had introduced, but it supported overruling *Patterson* because "[w]e believe that the law as interpreted in *Patterson* leaves a significant gap in Section 1981 coverage that should be filled." (Letter from Attorney General Dick Thornburgh to Senator Edward M. Kennedy, April 3, 1990, p. 11).

The June 8, 1990 Report of the Senate Committee on Labor and Human Resources on the Civil Rights Act of 1990 devoted an entire section to "The Need to Restore the Protection Against All Racial Discrimination in the Making and Enforcement of Contracts," stating that *Patterson* "sharply cut back on the scope and effectiveness of Section 1981." S. Rep. No. 315, 101st Cong., 2d Sess. 12 (1990). The Report also included a statement of minority views of Senators Hatch, Thurmond and Coats, with just one sentence regarding *Patterson*: "The *Lorance* and *Patterson* decisions do merit reversal." *Id.* at 65. The House reports in 1990 contained similar statements. *See* H.R. Rep. No. 644 Part 2, 101st Cong., 2d Sess. 9, 70 (1990) (Committee on the Judiciary) and H. R. Rep. No. 644 Part 1, 101st (continued...)

§ 101, which is presented as an interpretation of the phrase "make and enforce contracts" from the original version of § 1981, rather than as a re-wording of the original statutory phrase, comports with the legislative history. Because § 101 is restorative both with respect to the legal consequences Roadway anticipated when it discharged Rivers and Davison, and with respect to what Congress thought it was accomplishing in enacting § 101, established law requires its application here.

C. This Court's "Retroactivity" Decisions Since *Bradley* Are Consistent With That Decision and Support Application of § 101 Here

The Court's decision in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), while consistent with the principles articulated above, is not applicable here. *Bowen* announces a presumption against "retroactivity" for laws that change substantive rights, while *Bradley* establishes an opposite presumption for procedural, remedial and restorative measures. In *Bonjorno*, 494 U.S. 827, the Court ruled that the presumption articulated in *Bradley* was "[i]n

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[36](...continued)
Cong., 2d Sess. 18, 113 (1990) (Committee on Education and Labor).

On July 17, 1990, Senator Kennedy said in floor debates, "Now, we put the law back to what it was prior to *Patterson* in our substitute. The Bush Administration has also adopted virtually similar language in their own proposal, to overturn *Patterson*." 136 Cong. Rec. S 9848 (daily ed. July 17, 1990). The terms of the discussion were the same in 1991. Senator Durenberger pointed out that the 1991 Act overturned *Patterson* and *Lorance* and that "[a]ll interested parties, including the Administration, civil rights groups and business groups, agree that these two cases incorrectly narrowed the protections available to minorities." 137 Cong. Rec. 102d Cong., 1st Sess., S 7026 (daily ed. June 4, 1991).

apparent tension" with language in *Bowen*, but concluded that it did not need to "reconcile the two lines of precedent" because the case was decided based on the plain language of the statute. *Id.* at 837.[37] What may appear to be a conflict when the issue is framed as whether new statutes in general apply "retroactively" disappears on closer analysis of the nature of the legal changes at issue. The recent holdings of this Court carry forward the basic principles of *Bradley* and the pre-*Bradley* cases: new laws that impair vested rights or retrospectively change standards of conduct are "retroactive" in the technical legal sense used in *Bowen* and thus do not apply in pending cases, whereas other new laws, including remedial, procedural and restorative provisions, are not in the category of "retroactive" applications which *Bowen* condemns, and they do apply.[38]

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[37] Justice Scalia argued in a separate concurring opinion, which no other member of the Court joined, that *Bradley* was "in irreconcilable contradiction" with the line of cases regarding "retroactivity" and should be overruled. 494 U.S. at 841. Eight justices rejected that characterization of *Bowen* and *Bradley*. Four members of the Court, dissenting as to the meaning of the language of the statute at issue, insisted that *Bowen* and *Bradley* were entirely consistent, *id.* at 864-65; the majority opinion described any tension between the precedent as merely "apparent." *Id.* at 837.

[38] The United States is the party which argues most frequently in the federal courts that new statutes should apply to pending cases, and in so doing the Government frequently relies on *Bradley*. *See* Appendix A hereto (listing cases in which the United States has relied upon, or stood to benefit from, application of the *Bradley* presumption). A holding by this Court that *Bowen* or *Bonjorno* have limited or overruled *Bradley* might seriously jeopardize the government's enforcement efforts in areas far beyond civil rights. The agencies recently invoking the *Bradley* presumption include the Immigration and Naturalization Service and Criminal and Civil Divisions of the Department of Justice, the Department of Labor, the Environmental Protection Agency, Federal Deposit Insurance Corporation, Resolution Trust Corporation, Department of Health and Human Services, and many others. *Id.*

In *Bowen*, the Court construed rule-making authority of the Secretary of Health and Human Services not to include authority to adopt a "retroactive cost-limit rule," which would have permitted the United States to recoup fees already paid to the Hospital under prior reimbursement standards. In so holding, the Court commented:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.

488 U.S. at 208. The agency rule that *Bowen* identified as impermissibly "retroactive" would have deprived New Jersey of funds to which it was contractually entitled.

Bowen thus presented a classic problem of applying a new rule to conduct performed in reliance on existing legal standards. The hospitals had provided the medical services based on the government's representation that the hospitals would be reimbursed at rates that were fixed by the then controlling reimbursement schedules. When those rates were lowered two years later, their retroactive application would have required the State to repay over $2 million for services already rendered under the old schedule. Thus, to apply the new rule to the State's claims would have been "manifestly unjust" under *Bradley*.

Bonjorno's suggestion that *Bowen* and *Bradley* are reconcilable — but simply did not need to be reconciled in that case, *see* 494 U.S. at 837 — is consistent with the Court's earlier post-*Bradley* decisions. In *Bennett v. New Jersey*, 470 U.S. 632 (1985), for example, the Court explained that the presumption against "retroactivity" was a presumption regarding statutes affecting substantive rights and obligations:

Bradley held that a statutory provision for attorney's fees applied retroactively to a fee request that was pending when the statute was enacted. This holding rested on the general principle that a court must apply the law in effect at the time of its decision, which *Bradley* concluded holds true even if the intervening law does not expressly state that it applies to pending cases. *Bradley*, however, expressly acknowledged limits on this principle. "The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." This limitation *comports with* another venerable rule of statutory interpretation, *i.e.* that statutes affecting substantive rights and liabilities are presumed to have only prospective effect. *See, e.g., United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982); *Greene v. United States*, 376 U.S. 149, 160 (1964). *Cf. Bradley*, [416 U.S.] at 725 (noting that statutory change did not affect substantive obligations).

470 U.S. at 639-40 (emphasis added) (citations omitted).

The Court in *Bennett* held that the statute at issue in that case was "presumptively" inapplicable to existing claims because the statute had altered standards of conduct on which the parties had earlier relied. The majority emphasized the need for fixed standards on which officials granting Title I funds and those receiving them could rely. 470 U.S. at 640. *Bennett* suggests the *Bradley* line of decisions "comports with" the decisions referred to in *Bowen* because the circumstances expressly excepted from the *Bradley* presumption — statutes which would affect vested

rights or standards on which parties would have relied — are precisely the circumstances to which the *Bowen* presumption applies.

Thus, the *Bowen* presumption applies where application of a new law to a pre-existing claim would be "manifestly unjust" within the meaning of *Bradley*, and is fully consistent with that case. Because § 101 affects no vested rights and effects no substantive change, but merely restores remedies and procedures available when this case began, the *Bradley* presumption applies here. Within the meaning of *Bowen*, application of § 101 in this case is not a "retroactive" application at all.

Similarly, the Court viewed the post-judgment interest statute at issue in *Bonjorno*, which applied to all appeals taken from judgments entered after the effective date of the statute, October 1, 1982, as prospective. The Court so characterized it despite the fact that, for years after that effective date, most such appeals would occur in cases that were filed before, and arose out of conduct occurring before, October 1982. Application of the new interest rate to a November 1982 judgment, although necessarily involving a pre-Act claim, was characterized as *not retroactive*, because it was only on the date of judgment that the losing party, in deciding whether to pay the judgment or appeal, would have relied on the potential interest cost of further disputing that award.[39] As Justice Thomas recently

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[39] *See Bonjorno*, 494 U.S. at 839:

> [O]n the date of judgment expectations with respect to interest liability were fixed, so that the parties could make informed decisions about the cost and potential benefits of paying the judgments or seeking appeal.

(continued...)

explained, "not every application of a new statute to a pending case will produce a 'retroactive effect.'" *Republic National Bank v. United States*, ____ U.S. ____, 121 L. Ed. 2d 474, 492 (1992) (opinion of Thomas, J., concurring). Where, as here, a new statute affects only the procedures to be applied and the remedies to be awarded, its application to a pending case has no "retroactive" effect. In contrast, where a new law changes the substantive rules governing conduct, or eradicates vested rights, it is properly said to be truly retroactive within the technical legal meaning of that term as used in *Bowen*. Application of § 101 to the further proceedings that will in any event occur in this case has no "retroactive effect," because it merely means that a jury trial and damages will be available on all the discrimination claims. The non-retroactive effect of applying § 101 here is also clear because both a jury and damages were thought to be available when this case began.

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[39](...continued)
Justice Scalia denounced "retroactive" applications, but characterized as "prospective" the application of the new interest rate to any judgment entered after October 1, 1982 without regard to when the original violation occurred. *Id.* at 841.

CONCLUSION

The judgment of the Court of Appeals should be reversed insofar as it held that the unamended version of § 1981, and not the statute as amended by § 101 of the 1991 Civil Rights Act, governs the trial of plaintiffs' employment discrimination claims on remand to the district court.

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APPENDIX

APPENDIX A

Appellate Cases in Which the United States Has Sought to Apply a New Statute to a Pre-Existing Claim

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This list includes reported appellate decisions in which a court's opinion considered possible application of a new statute to a pre-existing claim and in which the party that would have benefitted from that application was an agency of the United States government. Because it was not feasible to examine the actual briefs in those cases, it is possible there may be a few instances in which the argument was raised by the court sua sponte, and was never briefed by the United States. Conversely, there are may be instances in which the United States sought such an application but they are not on this list, either because the reported opinion did not discuss the issue or because the opinion was not officially reported. Except as noted, the court decided to apply the new statute to the claim at issue.

Department of Justice - Criminal Cases

Turner v. United States, 410 F.2d 837, 842-43 (5th Cir. 1969) (1967 amendment to Universal Military Training and Service Act).

United States v. Haughton, 413 F.2d 736, 738 (9th Cir. 1969) (1967 amendment to Universal Military Training and Service Act).

United States v. Vanella, 619 F.2d 384, 385-86 (5th Cir. 1980) (amendment to Speedy Trial Act).

United States v. Fernandez-Toledo, 749 F.2d 703 (11th Cir. 1985) (amendment to Bail Act) (application denied).

Nilson Van & Storage Co. v. Marsh, 755 F.2d 362, 364-66 (4th Cir. 1985) (Comprehensive Crime Control Act of 1984).

United States v. Angiulo, 755 F.2d 969, 970-74 (1st Cir. 1985) (Bail Reform Act of 1984).

United States v. Zannino, 761 F.2d 52 (1st Cir. 1985) (Bail Reform Act of 1984).

United States v. Affleck, 765 F.2d 944 (10th Cir. 1985) (Bail Reform Act of 1984)

United States v. Miller, 830 F.2d 1073, 1075-76 (9th Cir. 1987) (Comprehensive Crime Control Act of 1984).

United States v. Wright, 873 F.2d 437, 443-44 (1st Cir. 1989) (amendment to statute regarding sentencing guidelines).

Commonwealth of Northern Mariani Islands v. Mendiola, 976 F.2d 475 (9th Cir. 1972)

Department of Justice - General Civil Litigation

Beatty v. United States, 191 F.2d 317, 320 (8th Cir. 1951) (1949 amendment to Housing and Rent Act).

United States v. Alabama, 362 U.S. 602 (1960) (1960 Civil Rights Act).

United States v. Village Corp., 298 F.2d 816 (4th Cir. 1962) (Virginia law extending statute of limitations).

United States v. Hinds County School Bd., 560 F.2d 619, 622-23 (5th Cir. 1977) (1972 Equal Educational Opportunity Act).

United States v. State of North Carolina, 587 F.2d 625, 626 (4th Cir. 1978) (executive branch reorganization approved by Congress).

United States v. Fresno Unified School Dist., 592 F.2d 1088, 1093-94 (9th Cir. 1979) (executive branch reorganization approved by Congress).

United States v. Commonwealth of Virginia, 620 F.2d 1018, 1022 (4th Cir. 1980) (executive branch reorganization approved by Congress).

United States v. Elrod, 627 F.2d 813, 819 (7th Cir. 1980) (Civil Rights of Institutionalized Persons Act).

Ruiz v. Estelle, 679 F.2d 1115, 1134-36 (5th Cir. 1982) (Civil Rights of Institutionalized Persons Act).

United States v. Marengo County Comm'n, 731 F.2d 1546, 1552-55 (11th Cir. 1984) (1982 amendments to Voting Rights Act).

United States v. Dallas County Comm'n, 739 F.2d 1529, 1534 (11th Cir. 1984) (1982 amendment to Voting Rights Act).

United States v. 6.93 Acres of Land, 852 F.2d 633 (1st Cir. 1988) (amendment to Equal Access Justice Act).

Ayers v. Allain, 893 F.2d 732, 754-56 (5th Cir. 1990) (Civil Rights Restoration Act)

United States v. Peppertree Apartments, 942 F.2d 1555, 1560-61 (11th Cir. 1991) (amendments to National Housing Act).

Department of Justice - Immigration and Naturalization Service

United States v. Kairys, 782 F.2d 1374 (7th Cir. 1986) (1961 amendment to immigration law).

Ayala-Chavez v. United States I.N.S., 945 F.2d 288, 294-95 (9th Cir. 1991) (1990 amendment to Anti-Drug Abuse Act) (application denied).

Department of Labor

Bethlehem Shipbuilding Corp. v. Cardillo, 102 F.2d 299, 303 (1st Cir. 1939) (1934 amendment to Longshoremen's and Harbor Workers' Compensation Act).

Luckenbach S.S. Co., Inc. v. Norton, 106 F.2d 137, 138 (3d Cir. 1939) (1934 amendment to Longshoremen's and Harbor Workers' Compensation Act).

New Amsterdam Casualty Co. v. Cardillo, 108 F.2d 492, 493 (D.C. Cir. 1939) (1934 amendment to Longshoremen's and Harbor Workers' Compensation Act).

Overseas African Construction Corp. v. McMullen, 500 F.2d 1291 (2d Cir. 1974) (amendment to 33 U.S.C. §928 [check this].

Cooper Stevedoring of Louisiana, Inc. v. Washington, 556 F.2d 268, 271-72 (5th Cir. 1977) (1972 amendment to Longshoremen's and Harbor Workers' Compensation Act).

Marshall v. Sink, 614 F.2d 37, 38 n.1 (4th Cir. 1980) (Federal Mine Safety and Health Amendment Act of 1977).

Reeves v. International Telephone and Telegraph Corp., 616 F.2d 1342, 1350 (5th Cir. 1980) (1978 amendment to Fair Labor Standards Act).

Sikora v. American Can Co., 622 F.2d 1116, 1119 (3d Cir. 1980) (amendment to ADEA) (application denied).

Rivera v. Becerra, 714 F.2d 887, 896 (9th Cir. 1983) (1980 amendment to Federal Unemployment Tax Act).

Environmental Protection Administration

Republic Steel Corp. v. Costle, 581 F.2d 1228, 1233-34 (6th Cir. 1978) (Clean Water Act of 1977).

United States v. Monsanto Co., 858 F.2d 160, 175-76 (4th Cir. 1988) (amendment to Comprehensive Environmental Response, Compensation and Liability Act).

United States v. R.W. Meyer, 889 F.2d 1497, 1505-06 (6th Cir. 1989) (Superfund Amendments and Reauthorization Act).

Schalk v. Reilly, 900 F.2d 1091, 1096-97 (7th Cir. 1990) (1988 Superfund Amendments and Reauthorization Act).

Federal Deposit Insurance Corporation

Demars v. First Service Bank for Savings, 907 F.2d 1237, 1239-40 (1st Cir. 1990) (Financial Institutions Reform, Recovery and Enforcement Act).

Federal Deposit Ins. Corp. v. 232, Inc., 920 F.2d 815, 818-19 (11th Cir. 1991) (Financial Institutions Reform, Recovery and Enforcement Act).

Federal Deposit Ins. Corp. v. Kasal, 913 F.2d 487, 493 (8th Cir. 1990) (Financial Institutions Reform, Recovery and Enforcement Act).

Federal Deposit Ins. Corp. v. Wright, 942 F.2d 1089, 1095 (7th Cir. 1991) (Financial Institutions Reform, Recovery and Enforcement Act).

Federal Deposit Ins. Corp. v. New Hampshire Insurance Co., 1991 U.S. App. LEXIS 30071 (9th Cir. 1991) (Financial Institutions Reform, Recovery and Enforcement Act).

Kirkbride v. Continental Cas. Co., 933 F.2d 729 (9th Cir. 1991) (Financial Institutions Reform, Recovery and Enforcement Act).

Greenberg v. Comptroller of the Currency, 938 F.2d 8 (2nd Cir. 1991) (Financial Institutions Reform, Recovery and Enforcement Act).

N.C.N.B. Texas National Bank v. P&R Investments No. 6, 965 F.2d 518 (5th Cir. 1992) (Financial Institutions Reform, Recovery and Enforcement Act).

North Arkansas Medical Center v. Barrett, 962 F.2d 780 (8th Cir. 1992) (Financial Institutions Reform, Recovery and Enforcement Act).

Resolution Trust Corporation

In re Resolution Trust Corp., 888 F.2d 57, 58 (8th Cir. 1989) (Financial Institutions Reform, Recovery and Enforcement Act).

Resolution Trust Corp. v. Lightfoot, 938 F.2d 65, 67 (7th Cir. 1991) (Financial Institutions Reform, Recovery and Enforcement Act).

Resolution Trust Corp. v. Camp, 965 F.2d 25 (5th Cir. 1972) (Financial Institutions Reform, Recovery and Enforcement Act).

Department of Health and Human Services

Harper-Grace Hospitals v. Schweiker, 691 F.2d 808, 811 (6th Cir. 1982) (law regarding Medicaid reimbursement).

Memorial Hosp. v. Heckler, 706 F.2d 1130, 1136 (11th Cir. 1983) (amendment to Medicaid law).

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